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CITATIONS

755327—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 148

HUMBLE OIL & REFINING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 778–781) is reported at 160 F. 2d 182.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1947 (R. 782). A petition for rehearing filed March 25, 1947 was denied April 1, 1947 (R. 787). The petition for a writ of certiorari was filed on June 25, 1947. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, when land upon which there are outstanding mineral leases is condemned in fee simple, it is error to admit testimony of the market value of the property as a whole without separating such testimony into mineral value and surface value.

STATEMENT

On June 25, 1940, the United States, at the request of the Secretary of the Navy, instituted proceedings to acquire 2,049.85 acres (128 parcels) of land on the Flour Bluff Peninsula near Corpus Christi, Texas, for a naval air base (R. 17–26). On July 5, 1940, the United States filed a declaration of taking and deposited estimated compensation in court, thereby vesting title in the United States pursuant to the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258 a (R. 27–33).

The lands acquired lie north and northwest of a number of oil-producing wells in the Flour Bluff Oil Field (R. 712). Except for one dry hole, no wells had been drilled in the area taken (R. 380, 711), the southern boundary of the naval base having been zig-zagged to avoid the producing area of the field (R. 648). The eight parcels (see R. 1) involved here contain a total of 1,269.66 acres

(R. 774–775; cf. R. 352).[1] Out of this acreage 878.55 acres had been leased by oil companies in 1936 for 5-year terms (R. 352, 536–538, 544, 774–775). These eight parcels along the southerly boundary of the air base, and closest to the producing wells of the Flour Bluff Oil Field, were tried together, the first trial being before three commissioners. The commissioners determined that the parcels had no mineral value and accordingly allowed a nominal sum of $1 for the mineral interests in each tract and various sums to the fee owners for the surface rights, buildings and other improvements (R. 110). Dissatisfied with this determination the owners of both the surface and mineral estates demanded a trial *de novo* before a jury (R. 110). The jury returned its verdict awarding specified amounts for the surface rights and improvements, but nothing for the mineral claims (R. 110). Various parties who owned both surface and mineral estates appealed to the Circuit Court of Appeals for the Fifth Circuit, contending that the trial court had erred in instructing the jury to the effect that the existence of oil should be considered only if there was a reasonable probability that oil was present in paying and commercial quantities (R. 111). The Circuit Court of Appeals reversed because of error in the

[1] Parcels numbered 79 and 79a have been treated as a single parcel since they were owned by the same person (cf. R. 163–164).

charge, saying (R. 112; *Eagle Lake Improvement Co.* v. *United States,* 141 F. 2d 562, 564 (C. C. A. 5):

> * * * Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful development are too speculative and remote to be "reasonably probable." In any event, such leases have a nominal value.

Upon remand to the district court, a second jury trial was had. Expert geologists testified at great length on behalf of both petitioners and the Government as to the possibility of producing oil from the lands condemned (R. 282–403, 668–710). Throughout the trial the Government contended that the issue was the value of the land as a whole, that separate valuation of the various interests therein was not permissible and that separate issues should not be submitted to the jury (e. g., R. 434, 757, 771). Petitioners contended that the value of different interests should be segregated and hence Government witnesses should not be permitted to value the property as a whole (R. 587, 634). The court overruled the objections of both parties. Petitioners' witnesses were permitted to give separate values for the surface, the leasehold estate and the royalty interest in each tract (R.

434, 442, 445, 454, 456, 470, 473, 475, 485, 487, 500, 502, 516, 517, 522, 523, 552). Two witnesses for the United States testified to the market value of each parcel as a whole including both the surface and mineral interests allowing only a wildcat value for the minerals (R. 587, 603, 634, 647). One Government witness testified to the separate value of the mineral interests and stated that in his opinion they had no market value on July 5, 1940, the date of the taking (R. 711). The court submitted to the jury special issues substantially as requested by petitioners, requiring the jury to determine (1) the fair market value of each parcel without regard to mineral value, (2) the fair market value of the seven-eighths oil, gas, and mineral leasehold estate in each parcel and (3) the fair market value of the one-eighth royalty interest in each parcel (R. 118–124, 761–764, 772, 780). The jury returned its verdict on October 27, 1944, in amounts totaling $76,487.15 (R. 124–125), judgment was entered thereon and the awards were apportioned among the various claimants on the same day, the owners of mineral interests receiving some $44,000 (R. 142–174).

The Circuit Court of Appeals affirmed the judgment of the District Court, applying the well-established principle that a condemnation proceeding is an action *in rem* and that as between condemnor and condemnee the property is valued as a whole, the award standing in place of the property to be apportioned among the owners of

interests therein (R. 780–782). The court pointed out that every ruling of the trial court was in favor of petitioners save the request to try the issues as to mineral values and surface values separately (R. 781) and that it had found no authority holding that they should be so tried (R. 780).

ARGUMENT

1. This case does not present a conflict with any applicable decision of a federal court. Petitioners cite no case holding that when the fee simple title to land subject to outstanding mineral leases is condemned, the mineral interests and surface rights must be valued separately and they concede that the "general concept" is to the contrary (Pet. 4). They contend, however, that under Texas law a mineral lease operates to sever the minerals from the surface and creates two separate and distinct estates (Pet. 2, 4–5, 12–14). From this it is concluded that local law requires the estates to be valued separately (Pet. 2, 11) and that therefore the decision below conflicts with this Court's decisions in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202 (Pet. 5, 14).

The only issue in the present case is the amount of compensation to which petitioners are entitled for the taking of their lands for public use (Pet. 1–2). State law does not and cannot "affect questions of substantive right—such as the measure of compensation—grounded upon the Constitution

of the United States." *United States* v. *Miller,* 317 U. S. 369, 380 (1943). The *Erie Railroad* and *Ruhlin* cases are plainly irrelevant. Cf. *United States* v. *Standard Oil Co.,* No. 235, October Term, 1946, decided June 23, 1947; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 366–367; *Board of Comm'rs* v. *United States,* 308 U. S. 343, 349–350; *United States* v. *Allegheny County,* 322 U. S. 174, 182–183. Nor does the decision in *United States* v. *Becktold Co.,* 129 F. 2d 473 (C. C. A. 8), upon which petitioners rely to establish a conflict (Pet. 5–6, 14–15) support their claim that because of local law it was improper to consider the value of the property as a whole since, in that case, the real estate taken was valued as a whole. The *Becktold* case represents simply another application of the rule that reference will normally be had to local law to determine the meaning of "property"—in that case to ascertain whether certain machinery was a fixture and hence part of the real estate taken. See *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279. This rule is not in conflict with the rule that, after the property taken has been defined, the manner of determining compensation for such taking is a federal question.

2. Moreover, the decision below does not conflict with local decisions. The Texas cases on which petitioners rely (Pet. 3, 4–5, 12–13) do not establish a right to a separate valuation of the mineral and surface estates in condemnation pro-

ceedings. The Texas courts have held that for various purposes a mineral lease may be said to sever the minerals from the surface and create "two distinct estates in fee simple," with the lessee the owner of a "determinable fee simple estate in the minerals." (Pet. 12.) It does not follow from the fact that the mineral interest is sometimes treated as a separate estate for the purpose of adverse possession, merger of estates, taxation and the like (Pet. 3) that such interest or estate must be valued separately when the whole land is condemned in fee. Cf. *Meadows* v. *United States,* 144 F. 2d 751 (C. C. A. 4); *Granville Lumber Co.* v. *Atkinson,* 234 Fed. 424, 429 (E. D. N. C. 1916).

If, as petitioners assert (Pet. 2; see also Pet. 4), the minerals "were as separate and distinct from the surface as though they were different tracts or bodies of land, lying hundreds—or thousands—of miles apart" the United States, under a condemnation petition and declaration of taking describing only the perimeter of the surface and not mentioning the minerals (see R. 19–24, 28), could not have acquired title to the minerals. Yet all parties have recognized that the mineral interests were condemned under the declaration of taking.[2] Furthermore the mineral and surface

[2] The United States attempted to file an amended declaration of taking excluding the minerals but the court struck this amendment since it agreed with the position of the mineral lessees, as stated in their answer (R. 63–64) that the min-

estates cannot be valued as if they were thousands of miles apart or even as if one were the east and the other the west half of a tract which had been vertically severed (cf. Pet. 2, 4). As the court below noted (R. 781, fn. 1):

> The fact that the minerals, if any, are located beneath the surface of the parcels condemned cannot be ignored. For example, Thompkins, the owner of the surface of parcel 80, claimed a value of $350 to $400 per acre on the theory that the best use of the tracts was for subdivision purposes [R. 549–555]. The owners of the mineral interests on that same parcel claimed values of $350 to $700 per acre for the leasehold and $175 to $300 per acre for the royalty interest [R. 409, 416, 417, 433, 435, 441, 444, 445–446, 470–471, 474–475]. Certainly, the surface could not be used for a residential subdivision if oil wells were drilled and producing. These are inconsistent uses. [Record citations inserted.]

Thus, separate valuation would merely open the door to awards based upon inconsistent uses of the property and consequent duplication of values. Cf. *Morton Butler Timber Co.* v. *United States*, 91 F. 2d 884, 887–888 (C. C. A. 6). Certainly petitioners have no right to receive such duplicate values. But that would seem to be the only basis

eral interests had been taken by the original declaration of taking (R. 39–41, 68). Cf. *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163 (C. C. A. 7).

for an increase over the present awards if a new trial should be had in which overall value would be excluded, since petitioners' separate evidence of mineral, royalty, and surface values was admitted and the jury returned special verdicts as to value of the separate estates.

CONCLUSION

The decision below is correct and presents no conflict. The petition for certiorari should therefore be denied.

Respectfully submitted.

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